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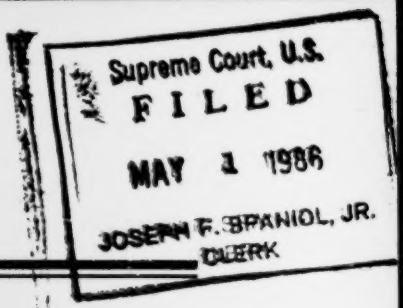

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THOMAS M. WISNIEWSKI
Lance Corporal, U.S. Marine Corps,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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48pp

QUESTION PRESENTED

WHETHER a military law enforcement officer's act of pressing his face against a closed venetian blind over a window and peering into a room through the $^{3}/_{8}$ by $^{1}/_{8}$ inch blind cord slot constitutes an unlawful invasion of a servicemember's expectation of privacy in his locked barracks room in violation of the fourth amendment.

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THOMAS M. WISNIEWSKI
Lance Corporal, U.S. Marine Corps,
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v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

Lance Corporal Thomas M. Wisniewski, U.S. Marine Corps, respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Military Appeals in this case.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals (App. A) is reported at 21 M.J. 370 (C.M.A. 1986). The opinion of the United States Navy-Marine Corps Court of Military Review (App. B) is reported at 19 M.J. 811 (N.M.C.M.R. 1984).

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on March 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

OTHER PROVISIONS INVOLVED

Article 36, Uniform Code of Military Justice,[1] provides:

> Article 36. President may prescribe rules.
>
> (a) Pretrial, trial and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers

[1] 10 U.S.C. § 836.

> practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
>
> (b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.

Rule 311(a) of the Military Rules of Evidence [2] provides:

> Rule 311. Evidence Obtained From Unlawful Searches and Seizures.
>
> (a) *General Rule.* Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if:
>
> (1) *Objection.* The accused makes a timely motion to suppress or an objection to the evidence under this rule; and
>
> (2) *Adequate interest.* The accused had a reasonable expectation of privacy in the person, place or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the armed forces.

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[2] Part III, *Manual for Courts-Martial, United States, 1984.*

STATEMENT OF THE CASE

Pursuant to his authority under the Uniform Code of Military Justice (UCMJ),[3] the Commanding General, 7th Marine Amphibious Brigade, Marine Corps Air Ground Combat Center, Twentynine Palms, California, convened a general court-martial to hear the case against petitioner. Petitioner was charged with wrongful possession and distribution of lysergic acid diethylamide in violation of Article 134, UCMJ.[4]

At trial, petitioner filed a Motion to Suppress Evidence. He alleged that the contraband had been illegally seized as a result of an illegal search conducted by the person acting as law enforcement agent at the scene, Sergeant Keane. The military judge denied petitioner's motion to suppress. Petitioner was convicted of wrongful distribution of lysergic acid diethylamide and was sentenced to be confined at hard labor for 9 months, forfeiture of all pay and allowances, reduction to lowest enlisted pay grade, and to be discharged from the service with a bad-conduct discharge.

The facts on which this petition is based are that on December 16, 1983, on board Marine Corps Air Ground Combat Center, Twentynine Palms, California, a Corporal Seipp, while delivering the platoon mail, knocked on the door of Sergeant Keane and expressed his belief that illegal drug trafficking was occurring in the room of another platoon member,

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[3] Article 22, UCMJ, 10 U.S.C. § 822.

[4] 10 U.S.C. § 934.

Lance Corporal Lansing.[5] Lansing's room, number 414, was located two doors away from Sergeant Keane's room. The apparent bases of Corporal Seipp's suspicions were the number and known character of persons observed to be frequenting Lansing's room.

Approximately three hours after his initial conversation with Seipp, Sergeant Keane observed two servicemembers known to him as Lance Corporal Turner and Hospitalman Irish attempting to enter Lansing's room. After knocking and receiving no response, these individuals asked Sergeant Keane if he knew the whereabouts of Lansing. When Sergeant Keane replied in the negative, they went to petitioner's door, located adjacent to Lansing's room on the opposite side. Sergeant Keane observed Turner and Irish talking to petitioner; the three servicemembers then left the barracks area.

Lance Corporal Lansing was on guard duty on the afternoon in question and his only assigned roommate was away on emergency leave. Petitioner was a fellow platoon member of Lance Corporal Lansing, and both Marines had been in the habit of visiting each other's rooms on an almost daily basis for approximately one year. (R. 55-59).

Lance Corporal Lansing, while on guard duty, allegedly requested petitioner to effectuate the physical transfer of illegal drugs stored in one of the wall lockers in Lansing's room to Irish and Turner. Lan-

---

[5] The Navy-Marine Corps Court of Military Review used its fact finding powers under Article 66(c), UCMJ, 10 U.S.C. § 866(c), to hold that Sergeant Keane, as senior noncommissioned officer of the barracks, was acting in an official governmental capacity. (App. 15a).

sing gave petitioner the key to the room door and the key to the wall locker. Petitioner expressed the belief that he had permissive access to Lansing's room for the period necessary to effect the transfer; that he had the authority during the period of his use of the room to exclude all other persons except Lansing and the other Marine assigned to the room, who at the time was on leave; and that he, petitioner, had authority to admit other people into the room. (R. 57-58).

After receiving the keys, petitioner, accompanied by Turner and Irish, proceeded back to Lansing's room. He opened the locked door and permitted the two individuals accompanying him to enter. Sergeant Keane observed as the trio entered the room and closed the door. Petitioner testified that the door was locked and at all times the venetian blind over the window remained drawn. There were no other persons within the premises.[6] (R. 58).

During the alleged transfer process, Sergeant Keane walked over to the window of Lansing's room and initiated a direct observation effort. He pressed his face to the glass of the window and attempted to peer through a hole in the blind on the left-hand side of the window. The purpose of this hole was to allow the string that draws open the blind to pass through. This hole was approximately $^3/_8$ of an inch long (vertically) and $^1/_8$ of an inch in width (horizontally). The blind was on the inside of the window leaving a space of between 2 $^1/_2$ - 3 inches between the hole in the

---

[6] The Marine barracks in question was architecturally similar to a roadside motel. All room doors opened onto a long external walkway that also served as a balcony or porch.

blind and the window. (R. 23; Appellate Exhibits V-IX).

Sergeant Keane testified that he observed petitioner open a wall locker in the room and transfer a white substance from a plastic bag to Irish and Turner. (R. 24). Keane also testified that he saw Irish and Turner ingest something. (R. 33). Suspecting a drug transaction, Sergeant Keane sent one of the nearby Marines for the officer of the day.

Prior to the arrival of the officer of the day, Sergeant Keane's superior, Staff Sergeant Lonard, arrived on the scene. Sergeant Keane related his observations to Staff Sergeant Lonard and then knocked on the door of Lansing's room. The door was opened by someone inside the room and Irish and Turner attempted to leave. Staff Sergeant Lonard ordered both of them to remain inside the room until the arrival of the officer of the day. Sergeant Keane advised petitioner that he had observed petitioner engaging in a drug transaction and that for petitioner's "own benefit" he should surrender the drugs. Staff Sergeant Lonard told petitioner to "give up the drugs." Petitioner responded to the order by pulling out a key from his pocket, opening Lansing's wall locker, and removing a plastic bag containing a substance later identified as 90 "squares" of lysergic acid diethylamide. (R. 34). As a result of these events, Irish gave a statement to the Naval Investigative Service on December 23, 1984, implicating petitioner in the distribution of drugs.

Pursuant to its fact finding power under Article 66, UCMJ,[7] the United States Navy-Marine Corps Court

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[7] 10 U.S.C. § 866.

of Military Review set aside the findings and sentence. The court made the following specific findings:

> (1) That appellant did have a supportable, subjective expectation of privacy in room # 414 at the time Sergeant Keane peered into the room via the slot in the closed venetian blind; and
>
> (2) That appellant's own personal and established expectation of privacy within room # 414 was objectively reasonable in terms of societal valuation not because of general approval of drug trafficking but because of society's valuation of separate dwelling areas with closed, locked entrance doors and windows blocked from outside public view.

(App. 22a).

Subsequently, the Judge Advocate General of the Navy certified the following two issues for review by the United States Court of Military Appeals:[8]

I

WHETHER THE U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW ERRED WHEN IT FOUND THAT THE ACCUSED'S EXPECTATION OF PRIVACY IN THE BARRACKS ROOM AND WALL LOCKER ASSIGNED TO ANOTHER WAS REASONABLE WHEN THE ACCUSED AND TWO OTHERS, NONE OF WHOM WERE ASSIGNED TO THE BARRACKS ROOM, ENTERED THAT UNOCCUPIED BARRACKS ROOM SOLELY FOR THE PURPOSE OF DISTRIBUTING LSD.

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[8] 10 U.S.C. § 867(b)(2).

II

WHETHER THE U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW ERRED WHEN IT FOUND A SERGEANT'S SEARCH TO BE UNLAWFUL WHEN, WITH PROBABLE CAUSE TO BELIEVE THAT DRUGS WERE BEING DISTRIBUTED BY THE ACCUSED IN A BARRACKS ROOM, THE SERGEANT PEERED THROUGH THE WINDOW, SAW DRUGS BEING DISTRIBUTED, ENTERED THE ROOM, AND OBTAINED DRUGS FROM THE ACCUSED.

The United States Court of Military Appeals answered the certified questions in the affirmative and reversed the decision of the United States Navy-Marine Corps Court of Military Review. (App. 3a). The court held that there was no reasonable expectation of privacy of the petitioner invaded by the actions of Sergeant Keane because he did nothing more than look through an opening available to any curious passerby. Plain view observations by an officer properly in position to have such a view did not constitute an unreasonable search under the fourth amendment. (App. 6a).

REASONS FOR GRANTING THE PETITION

Article 36, Uniform Code of Military Justice,[9] provides Presidential authority to establish special rules and regulations for the courts-martial system, including rules of evidence. Rule 311(a)(2) of the Military Rules of Evidence,[10] established pursuant to that

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[9] 10 U.S.C. § 836.

[10] Part III, *Manual for Courts-Martial, United States, 1984.*

power, specifically incorporates a servicemember's right to constitutional protections in this evidentiary area of search and seizure. In those areas of legitimate military necessity, the President has provided specific rules that are different from basic civilian protections. *Compare* Rule 313 of the Military Rules of Evidence, Inspections and Inventories.[11]

While recognizing the differences between military and civilian law, this Court has long acknowledged a servicemember's right to fundamental constitutional protections in the courts-martial system. *Parker v. Levy*, 417 U.S. 733 (1974). The Court of Military Appeals and the service Courts of Military Review have traditionally relied on the decisions of this Court for guidance in this area with regard to correct fourth amendment analysis. *United States v. Lawless*, 18 M.J. 255 (C.M.A. 1984); *United States v. Miller*, 13 M.J. 75 (C.M.A. 1982); *United States v. Lewis*, 11 M.J. 188 (C.M.A. 1981).

The Navy-Marine Corps Court of Military Review specifically found that sufficient societal value attached to a barracks room under the factual circumstances present in this case to warrant the protections of the fourth amendment (App. 22a). That court also found that the actions of Sergeant Keane constituted an unlawful search that invaded petitioner's fourth amendment expectation of privacy.[12] (App. 23a).

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[11] *Id.*

[12] The Court of Military Appeals will not disturb an opinion of the Court of Military Review as to factual conclusions found by that court, but it does have the primary responsibility to insure that the lower court properly applies the law to those facts. *United States v. Cherry*, 14 M.J. 251 (C.M.A. 1982).

In the case at bar, the Court of Military Appeals has utilized the "plain view" doctrine to characterize an initial viewing into a locked barracks room as non-intrusive. (App. 6a).[13] The court, in support of its conclusion, tersely cites the general proposition of law that an officer in a position to have "plain view" of the evidence in question does not unlawfully invade a legitimate expectation of privacy. (App. 7a). This conclusion is reached without applying the analysis provided by this Court regarding the reasonableness and prior justification of the initial intrusion to the undisputed facts of this case. *Texas v. Brown*, 460 U.S. 730, 739 (1983).

More importantly, the decision substantially erodes fourth amendment protections of *all* servicemembers

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[13] The lower court concluded that Sergeant Keane did nothing more than look through an opening available to any curious passerby. The actions of Sergeant Keane in the case far exceeded the normal use of the public walkway and the normal view from that walkway. *See State v. Alexander*, 170 N.J. Super. 298, 406 A.2d 313 (1979) (police officer's act of looking in defendant's second-story apartment by leaning over a fire escape railing to see in a window 8 feet from the fire escape constituted a search because the window was well out of the view of anyone engaged in the normal use of the fire escape); *State v. Adams*, 378 So.2d 72 (Fla. App. 1979) (police officer's act of going onto the porch and then standing on a chair to peer through a window above eye level in defendant's rooming house constituted an invasion of a reasonable expectation of privacy). Additionally, the pertinent test is reasonable expectation of one's privacy not perfection of one's privacy interest. To adopt the latter view would require an individual to stuff his keyholes and tape shut any opening, no matter how small, that may conceivably be used by law enforcement agents. *See Lorenzana v. Superior Court*, 9 Cal. 3d 626, 108 Cal. Rptr. 585, 511 P.2d 33 (1973); 1 W. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment* § 2.3(c) (1978 & Supp. 1985).

to be secure against unreasonable searches in their barracks rooms. The Court of Military Appeals misapplies precedent of this Court to lessen fundamental constitutional rights of servicemembers as a class without providing prior reason or purpose. This infringement is effectuated without a proper balancing process between justifiable military interest and a servicemember's right to personal security. *Cf. United States v. Harris*, 5 M.J. 44 (C.M.A. 1978).[14] It is also accomplished in direct contradiction of the Court of Military Review's finding that there is sufficient societal value in a locked barracks room to warrant traditional fourth amendment protection. (App. 22a).[15]

The primary question in the case *sub judice* is whether the law officer's act of pressing his face against a window and peering into a darkened room through a $^{3}/_{8}$ by $^{1}/_{8}$ inch cord slot in a closed venetian blind was an intrusion into a constitutionally protected area and an unlawful search.

The Court of Military Review found the following factual circumstances to be determinative: (1) petitioner's authorized entry into, and presence in, the locked room at the insistence of the assigned occupant of the room, Lance Corporal Lansing, using, at the request of Lansing, the key to that room; (2) petitioner's subsequent closing and locking of the door

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[14] In *Harris*, the Court of Military Appeals engaged in a lengthy "balancing test" analysis before concluding that the military interest in command authorized gate searches was greater than an individual's privacy rights.

[15] The President has not established a rule that lessens expectations of privacy by servicemembers in their barracks rooms pursuant to his powers under Article 36, UCMJ, 10 U.S.C. § 836.

to the room; (3) the lack of public view into the room because of the closed and locked door, and the drawn venetian blinds at the only window; (4) petitioner's use, once inside the room with Irish and Turner, of a separate key to open the lock on Lansing's wall locker, also at the insistence of Lansing; and (5) the obtaining from the locker of illegal drugs for distribution to Irish and Turner. (App. 21a).

The Court of Military Appeals disagreed with the lower court's conclusion, holding that the government agent did not invade petitioner's expectation of privacy because Sergeant Keane was standing on a public walkway at the time of his observation and did not physically trespass. (App. 6a). *Cf. United States v. Amuny*, 767 F.2d 1113 (5th Cir. 1985).

The fourth amendment protects legitimate expectations of privacy rather than simply places. The threshold question is whether an individual has a legitimate expectation of privacy in the place or thing to be searched. *See Illinois v. Andreas*, 463 U.S. 765, 771 (1983). A "search" occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. *United States v. Jacobsen*, 466 U.S. 109 (1984). Whether a trespass occurs is not determinative of whether an expectation of privacy is involved. *Oliver v. United States*, 466 U.S. 170 (1984); *United States v. Karo*, 468 U.S. 705 (1984); *Katz v. United States*, 389 U.S. 347 (1967).

The focus of the analysis with respect to expectation of privacy must be the accused's relationship to the premises, including authority over the premises and his actions on the premises. Fourth amendment protections apply to those persons who possess, in good faith, reasonable expectations that they are con-

ducting their activities in a context of privacy. *Rawlings v. Kentucky*, 448 U.S. 98 (1980). A person can have an interest in the residence of a third person such that he is protected by the fourth amendment against unreasonable governmental intrusion. *Rakas v. Illinois*, 439 U.S. 128 (1978). It is not necessary for an accused to have a proprietary interest in the place searched or item seized. The interest must be one in which a person has exhibited an actual expectation of privacy and that expectation must be recognized by society as being reasonable. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

To determine whether an actual and reasonable expectation of privacy exists, attention can be given to the following considerations:

> [W]hether the defendant has a possessory interest in . . . the place searched, whether he has the right to exclude others from that place, whether he has exhibited a subjective expectation that it would remain free from governmental invasion, whether he took normal precautions to maintain his privacy and whether he was legitimately on the premises.

United States v. Haydel,649 F.2d 1152 (5th Cir. 1981), *cert. denied*, 455 U.S. 1022 (1982). No single factor determines whether an individual legitimately may claim under the fourth amendment that a place should be free of government intrusion not authorized by warrant. *Oliver v. United States*, 466 U.S. 170, (1984).

In this case, petitioner entered a closed room with the consent and at the direction of the room's regular occupant. The door was locked; the blind over the

one window was drawn. The hole through which Sergeant Keane peered was a minute opening necessarily found in every type of venetian blind and, for the purpose of this argument, similar to the keyhole found in every door. Everything that society expects to be done to manifest an expectation of privacy was done here. To conclude that petitioner had no expectation of privacy simply because a curious passerby could violate that privacy without physical trespass is to engage in legal fiction.

The lower court attempted to justify its holding by relying on the "plain view" doctrine. This Court has espoused a rule that provides that contraband found in a public place may be seized by the police without a warrant because it involves no invasion of privacy and is presumptively reasonable assuming there is probable cause to associate the property with criminal activity. *Payton v. New York*, 445 U.S. 573, 587 (1980). This situation can perhaps be more aptly described as "public view" for it involves an observation that is made by a police officer without intrusion into a constitutionally protected area. *Scales v. State*, 13 Md. App. 474, 284 A.2d 45 (1971).

A different situation exists where evidence is discovered as a result of an intrusion into a constitutionally protected area. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). In that circumstance, the question must turn on the legality of the intrusion that enables the law officer to perceive the evidence at issue. "Plain view" provides grounds for seizure of an item when an officer's access to an object has some prior justification under the fourth amendment. "Plain view" is therefore better understood not as an independent exception to the warrant clause of

the Constitution, but simply as an extension of whatever the prior justification for an officer's "access to an object" may be. *Texas v. Brown*, 460 U.S. 730, 739 (1983).

The plurality opinion of this Court in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), adopted a three-prong test to permit warrantless seizures under the "plain view" doctrine. First, there must be a lawful "initial intrusion". *Id.* at 465-68. Second, the evidence must be discovered inadvertently. *Id.* at 470. Third, it must be immediately apparent to the police that the items observed are contraband. *Id.* at 466.

The facts of this case do not support a "public view" characterization of the discovery of contraband. The actions of Sergeant Keane were perpetrated with the specific intent of surmounting the physical barriers that created a legitimate expectation of privacy on the part of the petitioner. The viewing under the circumstances was not inadvertent, and constituted an unlawful initial intrusion and search. *United States v. Bradshaw*, 490 F.2d 1097 (4th Cir. 1974), *cert. denied*, 419 U.S. 895 (1974).

The Court of Military Appeals erroneously intertwines the analysis of "public view" (that evidence which is discovered in the public domain so that there are no fourth amendment concerns) and "plain view" (that evidence which is discovered lawfully and inadvertently in a constitutionally protected area under circumstances that would lessen an individual's legitimate expectation of privacy.)

CONCLUSION

The Court of Military Appeals misapplies the plain view doctrine to overcome the fourth amendment con-

cept of legitimate expectation of privacy. It erroneously focuses only on the single factor of physical trespass. This opinion creates a different standard resulting in a lessening of fourth amendment rights for *all* military servicemembers with regard to expectation of privacy in barracks rooms. This is accomplished without any analysis or balancing process to demonstrate why the military interest demands a lesser standard with regard to an individual's constitutional rights. *See New York v. Class*, ___, ___, 106 S.Ct. 960, 966-67 (1986); *Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967).

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

U.S. Court of Military Appeals.

No. 51556.
NMCM 84 2363.

UNITED STATES,

Appellant,

v.

THOMAS M. WISNIEWSKI, LANCE CORPORAL,
U.S. MARINE CORPS,

Appellee.

Accused, lance corporal, United States Marine Corps, was convicted by military judge sitting alone of distribution of lysergic acid diethylamide, and he appealed. The United States Navy-Marine Corps Court of Military Review, 19 M.J. 811, set aside the findings and sentence. Issues were certified for review. The United States Court of Military Appeals, Cox, J., held that: (1) the accused had no reasonable expectation of privacy in his friend's barracks room in which drugs were distributed where a sergeant was able to peer through an opening of blinds covering the window which was along a public walkway on which the sergeant was lawfully in place, and (2) the sergeant acted reasonably in gaining entry into the room to prevent further criminal activity once he observed what he believed to be not only the distribution of drugs, but also the ingestion of drugs.

Reversed.

For United States: *Lieutenant Commander John B. Holt, JAGC, USN* (argued); *Captain W.J. Hughes, JAGC, USN* (on brief).

For the accused: *Lieutenant John B. Consevage, JAGC, USNR* (argued); *Lieutenant Colonel M.W. Lucas, USMC* (on brief); *Lieutenant Commander Alvin L. McDonald.*

Opinion of the Court

COX, Judge:

Contrary to his pleas at a general court-martial, the accused was convicted* by military judge sitting alone of distribution of lysergic acid diethylamide (LSD), in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. He was sentenced to confinement at hard labor for 9 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence except for disapproving confinement in excess of 6 months and 17 days. The Court of Military Review set aside the findings and sentence after concluding that the military judge erred in denying a motion to suppress evidence as the fruits of an unlawful search and seizure. 19 M.J. 811. Whereupon, the Judge Advocate General of the Navy certified the following two issues for review by this Court:

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* The court below erroneously stated that the accused "was convicted . . . of possession of a prohibited drug," as well. 19 M.J. 811, 812. The possession specification was dismissed as multiplicious prior to findings. (R.118.) GCMO No. 7-84, dated 13 June 1984, fails to reflect this action at trial.

I

WHETHER THE U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW ERRED WHEN IT FOUND THAT THE ACCUSED'S EXPECTATION OF PRIVACY IN THE BARRACKS ROOM AND WALL LOCKER ASSIGNED TO ANOTHER WAS REASONABLE WHEN THE ACCUSED AND TWO OTHERS, NONE OF WHOM WERE ASSIGNED THE BARRACKS ROOM, ENTERED THAT UNOCCUPIED BARRACKS ROOM SOLELY FOR THE PURPOSE OF DISTRIBUTING LSD.

II

WHETHER THE U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW ERRED WHEN IT FOUND A SERGEANT'S SEARCH TO BE UNLAWFUL WHEN, WITH PROBABLE CAUSE TO BELIEVE THAT DRUGS WERE BEING DISTRIBUTED BY THE ACCUSED IN A BARRACKS ROOM, THE SERGEANT PEERED THROUGH THE WINDOW, SAW DRUGS BEING DISTRIBUTED, ENTERED THE ROOM, AND OBTAINED DRUGS FROM THE ACCUSED.

We answer the certified questions in the affirmative.

The facts giving rise to the suppression issue are essentially undisputed. At approximately 1300 hours, on December 16, 1983, Corporal Seipp was delivering the platoon mail in the barracks. While in the room of Sergeant Keane, he expressed his suspicions that another member of the platoon, Lance Corporal Lansing, was distributing drugs from his barracks room down the hall.

Sergeant Keane had been off duty since 0730 hours that morning. After the conversation with Corporal

Seipp, Sergeant Keane dressed in civilian clothes and went outside his room onto the walkway to get some fresh air, leaving his door open so he could hear the music from his stereo. Lansing's room was two doors down. The design of the barracks was similar to a motel, with each room having a large glass window next to a door leading outside to a walkway that ran the length of the barracks. The three-feet wide walkway was used not only to gain access to the rooms, but as a porch or balcony.

As Sergeant Keane lounged outside his room on the walkway for the next few hours, he noticed 20 to 30 people knocking on Lansing's door. They received no answer, however, as Lansing was on duty at the Guard Shack and his roommate was on emergency leave. At around 1630 hours, two persons from another platoon, known to Sergeant Keane as Lance Corporal Turner and Hospitalman Irish, knocked on Lansing's door. Upon receiving no response, they went next door to the accused's room. After a brief conversation, the accused went with the two men to find Lansing, who was still on duty. Lansing gave the accused keys to his barracks room and wall locker and asked the accused to transfer illegal drugs contained in the locker to the two men as "a favor."

When the accused and the two potential drug purchasers entered Lansing's barracks room, Sergeant Keane was still standing outside on the balcony. As the door closed behind the trio, it locked automatically. The venetian blind over the window was already shut. Sergeant Keane walked over to the window and peered into an opening in the blinds measuring approximately $^{1}/_{8}$-inch by $^{3}/_{8}$-inch.

He saw the accused open a wall locker and transfer a white substance to the two men, who then consumed some of the substance. Corporal Seipp and Lance Corporal Day came by while Sergeant Keane was peering in the window. They too looked through the hole in the blind, observing the figures in the room. Believing that he was witnessing a drug transaction in progress, Sergeant Keane sent Corporal Seipp to get the Officer of the Day. On the way, Corporal Seipp ran into the platoon sergeant, Staff Sergeant Lonard, and told him the situation. Lonard immediately went to the scene and Keane related his observations.

Both sergeants went to the door of Lansing's room. As Keane knocked on the door, he looked into the room through a two-inch space between the window and the door. He observed the accused close and lock the wall locker. The drug purchasers opened the door and attempted to exit the room, but were stopped. Sergeant Lonard ordered all three men to remain inside the room until the Officer of the Day arrived.

The accused then asked Keane what the problem was. Keane, who was a "very close" friend of the accused, responded that he "had witnessed . . . [the accused] in a drug transaction" and that the accused should "surrender the drugs" "for his own benefit." The accused responded by banging his head against a wall locker and uttering an expletive. Staff Sergeant Lonard then said, "Ski, give up the drugs." The accused pulled the locker key out of his pocket, opened the wall locker, and handed to Keane what was later determined to be 90 tablets of LSD.

The court below concluded that when Sergeant Keane peered in the window of Lansing's barracks

room, he conducted an unlawful visual search. Assuming without deciding that the court below correctly found that Sergeant Keane was acting throughout in an official rather than private capacity, we still disagree with that court's ultimate legal conclusion.

It is clear "that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place." *Rakas v. Illinois,* 439 U.S. 128, 142, 99 S.Ct. 421, 430, 58 L.Ed.2d 287 (1978). The ultimate issue in determining whether a Fourth-Amendment violation has occurred is whether there has been an official invasion of a legitimate expectation of privacy. Here, we conclude there was no reasonable expectation of privacy invaded by the actions of Sergeant Keane as he did nothing more than look through an opening available to any curious passerby. *Cf. United States v. Amuny,* 767 F.2d 1113 (5th Cir.1985). Plain-view observations by an officer properly in a position to have such a view do not constitute unreasonable searches under the Fourth Amendment. *See Texas v. Brown,* 460 U.S. 730, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983); *United States v. Wheeler,* 641 F.2d 1321 (9th Cir.1981). Moreover, contraband or other evidence of a crime falling into plain view are subject to seizure. *Washington v. Chrisman,* 455 U.S. 1, 5-6, 102 S.Ct. 812, 816, 70 L.Ed.2d 778 (1982); Mil.R.Evid. 316(d)(4)(C), Manual for Courts-Martial, United States, 1969 (Revised edition).

Although not cited by the court below, in *United States v. Lewis,* 11 M.J. 188 (C.M.A. 1981), this Court was faced with another situation where a sergeant

peered through the window of a barracks room. Writing for the majority of the Court, Chief Judge Everett stated, in part:

> Nothing in the record demonstrates that the area around the barracks was not available for general access or that Sergeant [C] was peeking into the room from a location where he generally would not be allowed to be present. Under these circumstances the occupants of the room had no reasonable expectation of privacy with respect to passersby—whether casual or official—who looked into the room through an opening available in the window.

Id. at 191. The same can be said of this case. The common walkway from which Sergeant Keane peered through the opening in the blinds was available for the use of residents of the barracks and their guests, as well as others having legitimate reasons to be on the premises. Sergeant Keane was lawfully in the place from which his observations were made. He had no difficulty in gaining a view into the room by merely peering through the openings in the blinds. Thus, the accused had no reasonable expectation of privacy from visual intrusions in the place and objects observed because they could be viewed with ease from a public walkway.

On observing what he believed to be not only the distribution of drugs but also the ingestion of drugs, Sergeant Keane acted reasonably in gaining entry into the room to prevent further criminal activity. As stated in *United States v. Acosta*, 11 M.J. 307, 313 (C.M.A. 1981), "[W]e can conceive of no greater exigency requiring immediate action than the perceived present active use of debilitating drugs by specific servicepersons." When Sergeant Keane knocked on the door of the room, it was opened without any inquiry as to his identity or purpose.

Had the situation remained stable and the drugs been in plain view with the locker open upon his entry into the

room, unquestionably Sergeant Keane would have been able to seize the drugs and apprehend the three men. As he was knocking on the door, however, Sergeant Keane observed the accused close and lock the locker. The question becomes whether the doctrine of plain view was fatally undermined by the fact that the drugs were no longer in sight. We hold that it was not under these facts. Sergeant Keane had just seen a crime in progress and the contraband in plain view. The entry into the room followed closely on the heels of the observations through the window. Once legitimately in the room, he could properly obtain the drugs already located via plain view just a few minutes before. *See United States v. Ortiz,* 603 F.2d 76 (9th Cir. 1979), *cert. denied.* 444 U.S. 1020, 100 S.Ct. 678, 62 L.Ed.2d 652 (1980); *United States v. Johnson,* 561 F.2d 832 (D.C. Cir.) (*en banc*), *cert. denied,* 432 U.S. 907, 97 S.Ct. 2953, 53 L.Ed.2d 1080 (1977).

The decision of the United States Navy-Marine Corps Court of Military review is reversed; the record of trial is returned to the Judge Advocate General of the Navy for remand to that court for further proceedings in accordance with Article 66, UCMJ, 10 U.S.C. § 866.

Chief Judge EVERETT concurs.

Appendix B

IN THE U. S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW

UNITED STATES

v.

THOMAS M. WISNIEWSKI, 303 78 0169, Lance Corporal (E-3), U.S. Marine Corps

DECIDED 6 DECEMBER 1984

LTCOL M. W. Lucas, USMC, Appellate Defense Counsel
LT John B. Consevage, JAGC, USNR, Appellate Defense Counsel
LCDR John B. Holt, JAGC, USN, Appellate Government Counsel

MAY, Judge:

Appellant was convicted contrary to his pleas, by general court-martial, military judge alone, of possession of a prohibited drug with intent to distribute and of distribution of that drug in violation of Article 134, Uniform Code of Military Justice. He was sentenced to a bad conduct discharge, confinement at hard labor for 9 months, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority approved only so much of the sentence as provided for a bad conduct discharge, confinement at hard labor for 6 months and 17 days, forfeiture of all pay and allowances, and reduction to pay grade E-1.

Appellant now assigns two errors. Our agreement with the first assignment renders unnecessary any addressal of the second assignment:

I
THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS ALL EVIDENCE AND STATEMENTS OBTAINED AS A RESULT OF AN ILLEGAL SEARCH AND SEIZURE CONDUCTED BY SERGEANT KEANE.

Factual Background

The following factual circumstances are extracted from the trial record:

At approximately 1300 on 16 December 1983, on board Marine Corps Air Ground Combat Center, Twentynine Palms, California, a Corporal Seipp, USMC, while delivering the platoon mail, knocked on the door of Sergeant Keane, the senior platoon noncommissioned officer living in the barracks, Building 1464. Corporal Seipp expressed his belief that illegal drug trafficking was occurring in the room of another platoon member, Lance Corporal Lansing. Lansing's room, #414, was located two doors away from Sergeant Keane's room. The apparent basis of Corporal Seipp's suspicions was the number and known character of persons observed frequenting Lansing's room. Following this conversation, Sergeant Keane walked out of his room and observed over a period of approximately two hours, 20-30 persons, all suspected of, or previously involved in, illegal drug involvement, knocking individually on Lansing's room. Lance Corporal Lansing, however, was on guard duty at the time and his only assigned roommate was on leave. Several of the persons, after receiving no response to their knocks on Lansing's door, asked Sergeant Keane regarding Lansing's whereabouts, and were informed of Lansing's guard duty assignment. All of these persons were apparently not members of the platoon.

At approximately 1630, Sergeant Keane observed two persons known to be assigned outside the platoon, knock-

ing on Lansing's room. These two persons, known to Sergeant Keane as Lance Corporal Turner and Hospitalman Irish, after receiving no response to their knocks on Lansing's door, asked Sergeant Keane if he knew the whereabouts of Lansing. Sergeant Keane replied that he did not. Turner and Irish then went to appellant's room which was located next door, on the far side, to Lansing's room. Sergeant Keane observed Turner and Irish talking to appellant, then the three persons left the barracks area.

Appellant was a fellow platoon member of Lance Corporal Lansing and both Marines had been in the habit of visiting each other's room on a frequent, almost daily basis, for almost a year. Appellant had not, however, ever stayed overnight in Lansing's room, nor did he store any of his personal possessions in the room. Appellant had no possessory interest in any property contained in the room, nor did he have a personal key of his own to Lansing's door or wall lockers inside the room.

Appellant had, however, during the period he, Irish and Turner were away from the platoon area after Sergeant Keane's first observation, been importuned by Lansing. Lance Corporal Lansing apparently requested appellant to effect the physical transfer of illegal drugs stored in one of the wall lockers in Lansing's room to Irish and Turner. Lansing then gave appellant the key to the room door and the key to the wall locker in which the drugs were stored. Appellant's testimony at trial expressed the belief that he had permissive access to Lansing's room for the period necessary to effect the drug transfer; that he had the authority during the period of his use of the room to exclude all other persons except Lansing and the other Marine assigned to the room, who at the time was on leave, and that he, the appellant, had the authority to admit other persons to the room, or in his words "... I would not have let the PMO in. But if it was someone that I knew."

After acceding to Lansing's request and receiving the keys to both the room door and Lansing's wall locker, appellant returned to Lansing's room with Turner and Irish. Sergeant Keane observed the trio enter the room and close the door behind them. Appellant testified that the door was locked and the blinds were drawn during the subsequent transfer of the drugs from inside Lansing's wall locker to Turner and Irish.

During the transfer process inside the room, Sergeant Keane had initiated further observation efforts. The sergeant testified that he was able to observe the actual transaction through the cord slot in one of the venetian blind slats, an opening estimated by the sergeant to measure $1/8$" x $3/8$" in dimension. Sergeant Keane testified that he observed appellant open up a wall locker in the room and transfer a white substance from a plastic bag to Irish and Turner. Suspecting a drug transaction, Sergeant Keane sent one of the nearby Marines for the officer of the day and invited several of the other nearby Marines to look into the room through the slot in the blinds. While the testimony of these other Marines confirmed the sighting of several male figures in the room while peering through the slot, none of the other witnesses could determine what, if any, actions were occurring inside the room.

Prior to the arrival of the officer of the day, the platoon sergeant, Staff Sergeant Lenard, arrived on the scene. Sergeant Keane related his observations to Staff Sergeant Lenard. Sergeant Keane then knocked on the door of Lansing's room. The door was opened by someone inside the room, Irish and Turner attempted to leave but were halted. Staff Sergeant Lenard ordered both to remain inside the room until the arrival of the officer of the day. Appellant asked "what was going on." Sergeant Keane responded by advising appellant that he had observed appellant engaged in a drug transaction, and that for appellant's "own benefit" he should surrender the drugs. Appellant's brief, albeit descriptive response was a short expletive accom-

panied by a banging of his, the appellant's, head against the wall locker. The platoon sergeant, Staff Sergeant Lenard then said to appellant, "Ski, give up the drugs." Appellant responded by pulling out a key from his pocket, opening a wall locker identified as Lansing's locker and removing a plastic bag containing a substance later identified as 90 "squares" of lysergic acid diethylamide.

From this pregnant meshing of evidentiary concepts and factual circumstances emerged the charges in this case and a suppression motion entered by appellant. Following presentation of the motion, the military judge denied the motion and made the following findings of fact:

> The court does specifically find that Sergeant KEANE was not a law enforcement agent, that he was off duty, in civilian clothes, not a supervisor of nor exercised direct disciplinary powers over WISNIESWKI, IRISH or TURNER, as interpreted by applicable case law. Sergeant KEANE's assumption of responsibility for cleanliness and orderliness of the barracks does not equate to direct disciplinary control, nor does the fact that he was an NCO and this was known by WISNIEWSKI, IRISH and TURNER to be so, made him an agent, that is a representative of the government or put him into a governmental capacity.
>
> The expectation of privacy of WISNIEWSKI, IRISH and TURNER was not constitutionally undermined by a government representative. For the purpose of the Fourth Amendment, the Military Rules of Evidence is of course to deter unlawful conduct by government authorities who have police powers. An unofficial, even if unlawful search by a private citizen acting on his own initiative, does not trigger Fourth Amendment rights. The resulting search warrant, seizure, ob-

taining contraband from Sergeant KEANE by law enforcement officials was properly or constitutionally correct.

Although the answer to question number one precludes for practical purposes answering the remaining questions, the court does find that Sergeant KEANE's peering into, entry into, and seizure of contraband was not a search and seizure protected by the Fourth Amendment, the Military Rules of Evidence. Sergeant KEANE, in his own mind at least, reasonably suspected that a crime was being committed, i.e. sale of drugs. The time was a weekend. WISNIEWSKI, IRISH and TURNER were in civilian clothes and were about to leave the room, reasonably could be expected then to leave the area, the base. There was a need to act quickly to preserve the fruits, i.e. evidence of crime.

Neither WISNIEWSKI, IRISH nor TURNER lived in the particular room in question, nor did they own the locker, nor did any of the three claim ownership of any of the items within the locker, i.e. again, contraband. Nothing was stored in the room or locker by WISNIEWSKI, IRISH, or TURNER, and of entry into the locker, however again, there was no claim of ownership nor possessory interest established for the record or claimed.

At the time of contact with Sergeant KEANE, Lance Corporal WISNIEWSKI was notified of what Sergeant KEANE had seen and knew full well of the situation. The explanation and subsequent actions were consensual. Again, as I have stated, the motion is denied.

We initially reject the government's contention both at trial and now, as well as the trial judge's finding, that

Sergeant Keane was acting in a private capacity in this case. From our examination of the record, including the testimonial references by Sergeant Keane to his professional concerns as a noncommissioned officer and the "senior NCO" in the barracks to stop drug trafficking in his platoon, his previous announcement to his platoon of his intention to come down "hard" on drug involvement, statements attributed to him by a Naval Investigative Service agent regarding the fruits of his "surveillance of a room up in the barracks," and his immediate summoning of the officer of the day subsequent to his "observation" of the drug transaction and prior to his entry into the room occupied by appellant, we find that Sergeant Keane was acting in an official capacity and not as a private individual. *Cf. United States v. Thomas,* 16 USCMA 306, 36 CMR 462 (1966); *United States v. Volante,* 4 USCMA 689, 16 CMR 263 (1954).

The official character of Sergeant Keane's activities notwithstanding, appellant's assignment must first be examined to determine whether *appellant* is the proper person to challenge the lawfulness of the government activities in this case.

Standing Issue

Rule 311(a) of the Military Rules of Evidence establishes the threshold issue for appellant:

> Rule 311.Evidence Obtained From Unlawful Searches and Seizures
>
> (a) *General rule.* Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if:
>
> (1) *Objection.* The accused makes a timely motion to suppress or an objection to the evidence under this rule; and

> (2) *Adequate interest.* The accused had a reasonable expectation of privacy in the person, place or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the armed forces.

Appellant certainly may call upon appropriate constitutional protections relative to his court-martial. *Parker v. Levy,* 417 U.S. 733 (1974). He must, however, satisfy a requirement that he enjoys a status under the law to challenge the lawfulness of the acquisition of the physical and testimonial evidence arrayed against him. That status, whether referred to as "standing," "adequate interest," or "Fourth Amendment rights" is not susceptible to easy determination. Like most criminal procedure issues, however, that determination is the essence of an appellate review process. Appellant's present contention, when reduced to its salient elements, is that as he opened Lance Corporal Lansing's wall locker in Lansing's barracks room and wrongfully distributed a quantity of an illegal drug to Irish and Turner, drugs that he had no prior property interest in, he possessed status under the umbrella of the Fourth Amendment to challenge the government's evidence of such distribution.

In determining the validity of appellant's claim of constitutional protection, we must, of necessity, determine the appropriate judicial interpretation of the amendment. The historical origins of this constitutional mantle of protection are well known. *Boyd v. United States,* 116 U.S. 616 (1886). Colonial experiences with the "writs of assistance" used by British authorities provided adequate motivation for constitutional barriers to such governmental intrusion. *Boyd,* at 625. It is left to the courts, however, to render the often finite decisions applying the general mandate of the amendment. *Weeks v. United States,* 232 U.S. 383,

391-92 (1914). A recurring issue has not been whether duly appointed governmental agents may generally crash in doors, rouse sleeping citizens, and conduct wholesale searches of private dwellings in the dead of night on unfounded suspicions. That type of obvious intrusion is generally rejected by all of our citizens, and to no lesser extent by the members of our armed forces charged with the defense of the Republic. What has been a recurring and complex judicial, and for obviously different reasons, law enforcement problem, is to whom should be granted the power to challenge the lawfulness of government searches, no matter the limited and moderate nature of the intrusion?

Although this case arises in a military context, we look to federal case law for current reference points to our analysis of this issue. *United States v. Lawless,* 18 MJ 255, 257, n.2 (CMA 1984); *United States v. Foust,* 17 MJ 85, 87 (CMA 1983); *United States v. McCullough,* 14 MJ 409, 411 (CMA 1983); *United States v. Miller,* 13 MJ 75, 77 (CMA 1982). In the period 1978-1980, the Supreme Court rejected the "automatic standing" rule of *Jones v. United States,* 362 U.S. 257 (1960), and "legitimately on the premises" determination. *Rawlings v. Kimberly,* 448 U.S. 98 (1980); *United States v. Salvucci,* 448 U.S. 83 (1980); *Rakas v. Illinois,* 439 U.S. 128 (1978). *Rawlings, Salvucci,* and *Rakas,* taken together, represented a significant departure from the *Jones* concept that one charged with the possession of that evidence produced by government search or seizure efforts was perforce accorded "standing." Those decisions also crystallized the Court's limitation of potential assertors of Fourth Amendment protection.

The initial harbinger of the Court's view, *Rakas,* was an automobile search situation and arguably not applicable to the immobile environments of dwellings or barracks. *See Cardwell v. Lewis,* 417 U.S. 583, 589-91 (1974). The decisions in *Rawlings* and *Salvucci,* however, leave little room to doubt the Court's concern with limiting Fourth

Amendment protections to those persons who possess good faith, and reasonable, expectations that they are conducting their activities in a context of privacy. The focus, therefore, is not upon singular indices of property law, elements of proof related to possessory offenses, or the almost uncircumscribed reaches of "legitimately on the premises." No single "talismanic" factor is now determinative of one's right to challenge, on Fourth Amendment grounds, the lawfulness of search or seizure efforts. *United States v. Haydel,* 649 F.2d 1152, 1154 (5th Cir. 1981), *cert. denied,* 455 U.S. 1022 (1982). The general concept which we apply, however, in determining appellant's ability to assert Fourth Amendment protections is contained in *Katz v. United States,* 389 U.S. 347, 361 (1967) (Harlan, J., concurring): "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' " *See Oliver v. United States,* ___U.S. _, 80 L.Ed. 214, 223 (1984).

What, then, are the factors which may guide this determination? We find that in establishing the reasonableness of an asserted expectation of privacy, the following factors should be considered:

1. *What was the intent of the framers of the Fourth Amendment? Oliver, supra* at 224, citing *United States v. Chadwick,* 433 U.S. 1 (1977). *Chadwick* involved the seizure and search of a footlocker located in the open trunk of a car parked outside a train terminal. Pointing out the mobile nature of the vehicle, the government contended that the Fourth Amendment was never intended to protect items with such tenuous linkage to the accepted concept of home or dwelling. The government's view was in support of a narrow interpretation of the amendment applied only to "interests traditionally identified with the home." After examining afresh the historical experiences of the colonists with the arbitrary and generally unlimited war-

rants issued by British colonial authorities, the Court rejected this narrow interpretation offered by the government and found no intention by the framers to limit the protections of the amendment to areas closely embodied in a person's home or dwelling. Instead, the Court found that there had been a sufficient "manifestation," by the owners of the *double-locked footlocker*, of "an expectation that the contents would remain free from public examination." This expression of subjective reliance was, in the view of the Court, fully consonant with the purposes of the Fourth Amendment. *Id.* at 11.

2. *What was the nature and character of the petitioner's presence on the premises or area of the search? Rakas v. Illinois,* 439 U.S. 128 (1978). While the Court in its decision in *Rakas* was critical of the potentially broad sweep of the "legitimately on the premises" concept expressed in *Jones,* had, by the character of his presence: key to the apartment, storage of his clothing there, and one overnight stay, established a "lawful presence." *Rakas,* at 141. The Court viewed of minor importance the "arcane" concepts of property law, *i.e.,* "guests," "invitees," "visitors." *Id.,* at 143. What were viewed as substantial indicators of Jones' right to assert his Fourth Amendment claims were those personal linkages to the subject premises which focused clearly on the petitioner's actions and authority rather than the *nature of the property* itself. Jones' authority to be on the premises, his limited dimension and control which included the right to exclude others, and his actions taken to insure privacy were considered significant determinants of his right to claim constitutional protection from government intrusion into an apartment dwelling owned and occupied by a third party. *Rakas,* at 149.

3. *Has our society placed sufficient value upon the specific type of area involved to justify Fourth Amendment protection? Oliver,* at 224. The surviving concepts of *Jones* focus on the *petitioner's* linkages to the premises or area rather than to an analysis of the premises or area searched.

Rakas, at 141-43. An analysis of the physical setting is obviously required, however, lest the reach of Fourth Amendment protections be extended beyond objectively reasonable limits. Few would contend, for example, that one who maintains full possessory and ownership "rights" to an *unlabeled,* locked, suitcase left *unattended* in a barracks recreation room or in the center of a base parade ground, could challenge, on Fourth Amendment grounds, the seizure and search of that suitcase by government agents. Proof by the owner of the suitcase that he possessed the only set of keys to the suitcase locks, that the contents and suitcase were unquestionably his private possessions, and that he had inadvertently left the suitcase unattended, would not trigger Fourth Amendment protection. The reason for barring the constitutional protection is not related to the personal ownership or possessory rights of the petitioner to the suitcase or its contents, or the lack thereof, but to the character of the surrounding premises or area in which the unlabeled suitcase was found. The clearly public nature of recreation rooms and parade grounds represent areas over which society is not prepared to lay broad coverage of the Fourth Amendment. We can discern, however, general and historic societal beliefs that dwelling areas are accorded the maximum protection of the amendment. The amendment also reaches from the clearly constitutionally-protected dwelling areas of homes and apartments, to military barracks and field tents and across the spectrum of potential physical settings such as automobiles and those public areas which possess a proportional, imprecise, yet objectively reasonable degree of society's valuation in terms of privacy expectations. *See generally Oliver, supra,* 224-27; *Payton v. New York,* 445 U.S. 573 (1980); *Marshall v. Barlow's, Inc.,* 436 U.S. 307 (1978); *United States v. Mitchell,* 12 MJ 265 (CMA 1982); *cf. United States v. McCormick,* 13 MJ 900 (NMCMR 1982).

The analysis which we now apply incorporates the above factors:

> Recognizing the historical intent of the Fourth Amendment, as judicially interpreted, did the petitioner, at the time Sergeant Keane peered through the venetian blind slot into room #414, have a supportable, subjective expectation of privacy in that room, *and* was that subjective expectation objectively reasonable in the view of society? Or, stated another way, to those government agents or officials facing similar search situations: Are we here confronted with a situation in which the individual or individuals involved have taken observable steps to insure privacy over an area or location which, under the circumstances, is obviously not open to public observation or inspection or to general public access?

If the answer to either of the above delineating inquiries is "yes," then only the existence of exigent circumstances will obviate the need for a valid search authorization or clearly *voluntary* consent prior to initiating any search efforts, *if* the subsequent admissibility of the evidence is a concern. *Compare* Rule 312, Bodily Views and Intrusions; Rule 313, Inspections and Inventories; and Rule 314, Searches Not Requiring Probably Cause.

Application To Present Case

We have applied the above analysis to this case and we find the trial judge erred in his denial of appellant's motion. The circumstances are easily discernible, as previously summarized in the trial record. We do not find, as the trial judge apparently did, that the lack of ownership claim to the room or its contents is determinative. We do find the following factual circumstances determinative: (1) appellant's authorized entry into, and presence in, the locked room #414 at the instance of the assigned occupant of the room, Lance Corporal Lansing, using, at the request of

Lansing, the key to that room; (2) appellant's subsequent closing and locking of the room door; (3) the lack of public view into the room because of the closed and locked door, and the drawn venetian blinds at the only window; (4) appellant's use, once inside the room with Irish and Turner, of a separate key to the lock on Lansing's wall locker, also at the insistence of Lansing and with the permission of Lansing; and (5) the obtaining from within that locker, the illegal drugs for distribution to Irish and Turner.

In consideration of these factual circumstances, we find: (1) That appellant did have a supportable, subjective expectation of privacy in room #414 at the time Sergeant Keane peered into the room via the slot in the closed venetian blind, and (2) That appellant's own, personal and established expectation of privacy within room #414, was objectively reasonable in terms of societal valuation not because of general approval of drug trafficking but because of society's valuation of separate dwelling areas with closed, locked entrance doors and windows blocked from outside public view.

We recognize that we have previously distinguished military barracks from on-base and off-base quarters assigned to military personal for the purposes of arrest authority. *McCormick, supra,* at 903-04. Here, however, we are dealing not with the existence of foundation circumstances supporting apprehension or arrest authority as in *McCormick.* Here we find the existence of sufficient societal value attached to dwelling areas, whether barracks or off-base private dwellings, to warrant the protections of the Fourth Amendment *under the factual circumstances herein presented.*

Therefore, we find that appellant did possess adequate interest in room #414 to challenge the legality of the government search and seizure in this case. MIL.R.EVID. 311.

Lawfulness Of Search

We find, contrary to the view of the trial judge, that when Sergeant Keane peered through the minute opening in the closed venetian blinds of room #414, he conducted an unauthorized "search" of that room. *United States v. Bradshaw,* 490 F.2d 1097 (4th Cir. 1974), *cert. denied,* 419 U.S. 895 (1974). We find no exigent circumstances to justify that search. MIL.R.EVID. 315(g). We further find that the subsequent entry into the room and seizure of the contraband drugs by Sergeant Keane and Staff Sergeant Lenard was an outgrowth of the unlawful search actions of Sergeant Keane, and subsequent submission in the face of authority, by appellant. MIL.R.EVID. 316. We also find that appellant's giving up of the contraband was not a consensual decision, but an acquiescence to the presence, authority, and thinly veiled orders of his superiors. We specifically find that the government did not establish, by clear and convincing evidence, voluntary consent to search in this case. MIL.R.EVID. 314(e). *United States v. Chase,* 1 MJ 275 (CMA 1976).

We therefore find the evidence which was the basis of the charges in this case was inadmissible as being the fruits of an unlawful search and seizure. MIL.R.EVID. 311.

This case is an example of the potential outcome when officers or noncommissioned officers most likely to be confronted with search and seizure situations fail to comply with the procedures dictated by the Military Rules of Evidence. There is no necessity to have a "duty" lawyer or legalman "on call" in such circumstances. Any reasonable layman could have discerned the defect in the initial report of Sergeant Keane to his platoon sergeant, Staff Sergeant Lenard, *prior* to the entry into room #414. Sergeant Keane's observation had clearly been the result of the peeping through the venetian blind slot. There were no

public or "plain view" circumstances present. Alternative procedures, however, were available. Sufficient observation of the number, type, and character of traffic to the room earlier in the day appears to have provided ample probable cause to support a request for search authorization. Certainly adequate justification was available for the platoon sergeant or Sergeant Keane to have halted anyone attempting to leave the room until a search authorization was obtained.

Instead, two apparently experienced noncommissioned officers proceeded to engage in a course of action that was both *unnecessary* and unlawful. The search procedures necessary under the rules of evidence are not so esoteric or complex that they cannot be applied by all officers and noncommissioned officers of the naval service. These Procedures can be easily incorporated into all officer and noncommisioned officer professional military training schedules as they are for officer and enlisted law enforcement personnel. The training and indoctrination of personnel in authority positions in appropriate search and seizure and often related interrogation procedures is not aimed at the production of additional judge advocates, but rather the development of officers and noncommissioned officers equipped to carry out their statutory responsibilities. Evidentiary procedures rest most persuasively, not upon lofty and legalistic pronouncements, but upon basic concepts of reasonableness, fairness, and our Constitution. Failure to follow these procedures, as here, invite ultimate remedial action at the appellate level.

The findings and sentence as approved below are set aside. The findings of guilty are reversed. The record of trial is returned to the Judge Advocate General of the Navy for transmittal to the appropriate convening authority. A rehearing may be ordered.

/s/ J. S. May
J. S. MAY

Chief Judge EOFF and Judge RAPP concur.

/s/ Albert W. Eoff II
ALBERT W. EOFF II

/s/ Michael D. Rapp
MICHAEL D. RAPP